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OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D. C. 20301

COMPTROLLER
(Administration)

January 11, 1979

ADMINISTRATIVE INSTRUCTION NO. 9

SUBJECT : Processing Complaints of Discrimination

References : (a) Administrative Instruction No. 9, subject as above,
August 20, 1975 (hereby **cancelled**)
(b) Executive Order 11478, "Equal Employment Opportunity
in the Federal Government," August 8, 1969
(c) **Part** 713, Civil -Service Regulations (FPM Supplement
990-1)
(d) through (g) , see enclosure 1

A. REISSUANCE AND PURPOSE

This Instruction reissues Administrative Instruction No. 9 (reference (a)); implements the provisions of references (b), (c), and (d); and provides procedures for processing complaints of discrimination on the grounds of race, color, religion, sex, age, national origin, physical or mental handicap. It also defines the rights and the more significant role in the complaint process of individuals named as "Alleged Discriminating Officials."

B. APPLICABILITY AND SCOPE

The provisions of this Instruction apply to all U.S. citizen employees of, and applicants seeking employment with, the organizational entities of the Office of the Secretary of Defense, the Organization of the Joint Chiefs of Staff, and activities serviced by the Directorate for **Personnel** and **Security**, Washington Headquarters Services (**WHS**), and the Office of Civilian Health and Medical Program of the Uniformed Services.

c. POLICY

It is OSD policy to provide prompt, fair, and impartial consideration and disposition of complaints involving **issues** of discrimination on the grounds of race, color, religion, sex, age, national origin, and physical or mental handicap. Complaints of discrimination based on age will be accepted only from current Federal employees and applicants who are at least 40 years of age at the time the alleged discriminatory action occurred.

D. DEFINITIONS

1. For the purpose of this Instruction, the following definitions apply:

a. Class: A "Class" is a group of agency employees, former agency employees, and/or applicants for employment, on whose behalf it is alleged that they have been, are being, or may be adversely affected, by an OSD personnel management policy or practice which OSD has the authority to rescind or modify, and which discriminates against the group on the basis of their common race, color, religion, sex, national origin, age, physical or mental handicap.

b. Agent: An "Agent of the class" is a class member who acts for the class during the processing of the class complaint.

E. RESPONSIBILITIES

1. The Director of Equal Employment Opportunity (EEO), designated in Administrative Instruction No. 31 (reference (e)), shall:

a. Counsel or provide for counseling of aggrieved employees, including agents of a class acting for a class, during the process of a class. complaint (Administrative ~~Instruction~~ 21, reference (f));

b. acknowledge receipt of discrimination complaints;

c. provide for the investigation consideration;

d. dispose of complaints of discrimination;

e. order corrective action when necessary.

2. The Equal Employment Opportunity Officer (EEEO), designated in Administrative Instruction 31 (reference (e)), and **OCHAMPUS** EEO plan, shall assist the Director of Equal Employment Opportunity in carrying out such responsibilities. In addition, the Equal Employment Opportunity Officer(s) shall:

a. Select and train or arrange for the training of EEO Counselors, select persons to investigate complaints and conduct hearings, furnishing them appropriate letters of authority, and making necessary administrative arrangements for investigations and hearings.

b. Publish the names and addresses of the Director of EEO, the EEEO, The Federal Women's Program Coordinator, Hispanic Employment Program Coordinator, and the EEO Counselors.

c. Make this Instruction readily available to employees, their representatives, the public, and labor organizations.

d. Ensure that persons named as alleged discriminating officials (ADO's) are (1) informed regarding any allegations made against them; (2) given a full and fair opportunity to respond for the record; and (3) kept informed as to the progress and outcome of cases.

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3. The Federal Women's Program Coordinator, designated by the Director of Equal Employment Opportunity, shall advise the Director of EEO on matters affecting the employment and advancement of women.

4. The Hispanic Employment Program Coordinator, designated by the Director of Equal Employment Opportunity, shall advise the Director of EEO on matters affecting the employment and advancement of persons of Hispanic origin.

5. The Equal Employment Opportunity Counselor(s), designated by the Director of Equal Employment Opportunity, shall counsel any aggrieved civilian employee or applicant for employment, and seek resolution, on an informal basis, of matters giving rise to an allegation of discrimination on the grounds of race, color, religion, sex, age, national origin, physical or mental handicap. This includes class complaints of discrimination (Administrative Instruction 21, reference (f)).

F. PROCEDURES

1. General

a. With the exception of alleged discrimination in an appeal of an adverse action, all allegations of discrimination based on color, race, religion, sex, age, national origin, physical or mental handicap are processed in accordance with the provisions of this Instruction. Allegations of discrimination in an appeal of an adverse action are processed under the provisions of Administrative Instruction No. 70 (reference (g)) .

b. Discrimination complaints filed by several persons relating to the same or similar issue(s) may be consolidated with the written consent of the affected complainants. When a complaint is consolidated, each complainant will receive a separate report of the investigation, although only one investigation may have been conducted. Each complainant will be entitled to a separate proposed disposition. One hearing will be conducted, but a separate final decision will be given each complainant. A withdrawal of a complaint by one complainant will not affect the processing of the remaining complaints in the consolidated complaint.

c. A complainant whose complaints have been joined for processing will be granted one investigation, one meeting for purposes of attempting informal adjustment, one hearing, and one final agency decision. The consent of the complainant is not required for joint processing of individual discrimination complaints filed by the same complainant.

d. It is essential to the integrity of the complaint system that complainants, their representatives, and witnesses be free from restraint, interference, coercion, discrimination, or reprisal at any phase of the complaint process. Supervisory and management personnel

must be knowledgeable about these regulatory provisions and understand its impact and philosophy.

e. Since complainants, representatives, and ADO's receive copies of the investigative file and hearing transcript and other related documents if any, extreme discretion must be exercised with regard to their use. The regulatory prohibition against use of official information for private purposes applies. In addition, Privacy Act restrictions against improper disclosure are binding on all employees covered by this Instruction.

2. Presenting a Complaint

a. The officials designated to receive complaints are: the Director of EEO, the EEEO, the Federal Women's Program Coordinator, and the Hispanic Employment Program Coordinator. Upon receipt of the complaint, the official (if other-than the EEEO) will immediately transmit the complaint to the EEEO. The EEEO will then inform the complainant in writing within 7 working days of his or her rights. The EEEO will review the complaint to determine whether it should be accepted or rejected; however, the complainant must be notified in writing of his or her right of appeal with respect to the portions which have been rejected.

b. Complaints containing allegations which are so vague that no specific issue(s) can be defined will not be accepted for investigation. However, the EEEO will give the complainant the opportunity to furnish more specific information regarding the issue(s). If the complainant is unable or refuses to supply more specific information within a specified amount of time, the EEEO will cancel the complaint and advise the complainant of the right of appeal.

c. Complainants will be free from restraint, interference, coercion, discrimination, or reprisal, and shall have the right to a representative of their choice. EEO officials may not serve as representatives for complainants or for management in connection with the processing of a discrimination complaint. Complainants or their representatives who are assigned to organizational entities covered by this Instruction will be allowed a reasonable amount of time to prepare and present their complaints.

3. Time Limits

a. Employees and applicants for employment must bring the complaint to the attention of the counselor within 30 calendar days of the date of the action. In addition, any formal complaint must be submitted in writing within 15 calendar days of the complainant's last interview with the counselor. Exceptions may be made under the following circumstances :

(1) The complainant was not aware of these time limits.

(2) The complainant was in possession of insufficient evidence to form a conclusion regarding the presence of discrimination.

b. For complaints of discrimination based on physical or mental handicaps for acts or actions that occurred 1 year prior to 10 April 1978, complaints must meet the following criteria:

(1) The complaint was brought to the attention of an official of an activity covered by this Instruction within 30 calendar days of the act or the effective date of a personnel action,

(2) The complaint was not adjudicated under some other grievance or appeals procedure, and

(3) The complaint is filed within 180 calendar days of the effective date of Subpart G, Part 713 of the Commission's regulations which is 10 April 1978 (reference (c)).

4. Counseling

a. The complainant must first consult with an EEO counselor. The counselor will make inquiries necessary to identify the problem and will counsel the complainant concerning the merits of the matter. The counselor will seek a resolution of the matter on an informal basis. Insofar as practicable, the counselor shall conduct a final interview with the complainant no later than 21 calendar days after the date on which the matter was called to the counselor's attention.

b. When an aggrieved employee or applicant has named or otherwise identified an individual as being responsible for an alleged act of discrimination, the EEO counselor must solicit the views of that ADO unless the counselor otherwise obtains and provides information which exonerates the official to the clear satisfaction of the aggrieved person. Preliminary to the counselor's interview with the official, the latter must be advised that he or she has been named or identified by a potential complainant; must be informed of the nature of any accusations made; and must be advised of the right to have a representative present during the interview to provide advice on how to respond to any questions the counselor may ask. The EEO counselor must not reveal the identity of the aggrieved individual when the individual has not authorized the EEO counselor to do so.

c. If the final interview is not concluded within 21 days and the matter has not previously been resolved to the satisfaction of the complainant, the complainant will be informed in writing by the counselor of his or her rights to file a complaint. When the EEOO receives such a complaint, the counselor will be notified. The counselor will prepare a written report, including an evaluation of the merits of the matter and send the original to the EEOO and a copy to the complainant within 5 calendar days of the final interview with the complainant.

5. Processing the Complaint

a. Acceptance or Rejection of the Complaint

(1) The EEOC may recommend that the Director of EEO reject the complaint, if such complaint (a) is not covered by these procedures; (b) addresses identical matters dealt with in a previous complaint filed by the same complainant; (c) is without sufficient cause; or (d) was not submitted within the prescribed 30 calendar days.

(2) If a complaint is **cancelled** or rejected, the Director of EEO will advise the complainant, in writing, of that decision, and inform the complainant of his or her appeal rights.

(3) A complaint from an applicant or employee based on physical or mental handicap will be rejected, unless the complainant is one who (a) has a physical or mental impairment which substantially limits one or more of such person's major life activities; (b) has a record of such an impairment; **or(c)'is** regarded as having such an impairment.

b. Investigation

(1) The EEOC shall assign an investigator to the case when the complaint is accepted. The investigator will be furnished written authorization to:

(a) Investigate all aspects of the complaint.

(b) Require employees of the agency to cooperate in the conduct of the investigation. Those employees having any knowledge of the matter will be required to furnish testimony under oath or affirmation without a pledge of confidence.

(c) An ADO, whether identified at the time a formal complaint is filed or during the course of the investigation, must be given an opportunity to respond to any and all allegations made against him or her. In this respect, the investigator will interview and receive information from the ADO to assure that the official has an opportunity to respond to all of the allegations. Documents in which the ADO is identified and charged with discrimination or other wrongdoing intended for inclusion in the investigative file, including the EEO counselor's report, the complaint, the complainant's affidavit, and other affidavits in which the alleged discriminating official is named, must be made available to the official for this purpose. Names of and identifying information on persons other than the complainant and the alleged discriminating official will be deleted from copies of the documents shown to the ADO, to protect such persons from unwarranted invasion of privacy. The ADO must be given full opportunity to state the facts as he or she sees them, in affidavit form, for inclusion in the investigative file, and given an opportunity to name witnesses.

(d) The investigator will establish an investigative file which will include relevant documents and information pertinent to the complaint, or the general environment from which the complaint arose. The investigator will *then* furnish the completed file to the EEEO .

c. Adjustment of Complaint and Offer of Hearing

(1) The EEEO will keep both an ADO and the complainant informed of the progress of the investigation in approximately the same manner in which the complainant is kept, informed. When the investigation is completed, the EEEO will review the investigative file to determine whether *or* not it contains information relevant to all the allegations. If the EEEO finds that there are allegations in the investigative report-against the ADO which *the* ADO has had *no* opportunity to confirm or deny, the EEEO will require an additional investigation to complete the case.

(2) The EEEO will make a copy of the investigative file available to the complainant or his or her representative promptly after receiving it from the investigator. After the complainant and the representative have reviewed the file and discussed it with appropriate officials, the EEEO will attempt to resolve the complaint on an informal basis. The EEEO may, at his or her discretion, consult with the ADO regarding the terms under which the agency will attempt to resolve the complaint informally. If an adjustment *is* reached on this basis, the EEEO will prepare a written report of the decisions reached, and will furnish a copy to the complainant or his or her representative, and the ADO . This report *will* be made a part of the complaint file and the case will be closed. However, the complainant will be informed of his or her right to reinstate the complaint at the point of termination of processing the adjustment, if, for reasons unrelated to the complainant's own acts, the terms of the adjustment are not carried out.

(3) If an adjustment is not reached, the complainant will be notified in writing by the EEEO of the disposition of the complaint. A copy of the proposed disposition of the complaint will be provided to the ADO. The complainant will be informed of the right to a hearing or the right to a decision without a hearing by the Director of EEEO. The EEEO must be informed in writing within 15 calendar days of the receipt of the notice whether a hearing is requested.

(4) If the complainant should fail to reply to the EEEO within the time limit, the EEEO will send the complaint file to the Director of EEEO for review and decision, and a notice to the complainant. The notice will inform the complainant of the right to appeal, within a defined time limit, to the Civil Service Commission and of the right to file a civil action. An exception is if the complaint is based on discrimination due to age, physical or mental handicap, in which case notice of right to file a civil action will not be given.

(b) Within 180 calendar days of the date on which the complaint was filed.

(2) The agency is bound by the examiner's decision if the Director of EEO does not make a decision within the prescribed period of time. If the Director of EEO modifies or rejects the complaint examiner's recommended decision of discrimination, the final decision must be mailed or hand delivered to the complainant or representative within the appropriate time limit. A record should be maintained, such as a postmark on a certified mail receipt, or dated receipt by the complainant or representative.

(a) If there has been a hearing, a copy of the examiner's findings, analysis, recommended decision, and a copy of the hearing record will be sent with the decision letter. The Director of EEO will adopt, **reject, or** modify the decision recommended by the complaints-examiner, **and will** state in detail in the decision letter the reasons for doing so.

(b) If there has not been a hearing or decision under paragraph F.5.c., above, the decision letter from the Director of EEO will include findings and analysis as well as the decision, and will inform the complainant of his or her appeal rights.

(3) The Director of EEO must provide the ADO a copy of the agency's final decision on the complaint.

(a) If the clear effect of the agency decision is to deny or reject the complainant's allegations against the alleged discriminating official, the latter will not be given access to the entire complaint file.

(b) If the agency decision, either directly through a finding of discrimination or indirectly through a finding of error, concludes or implies impropriety on the part of the alleged discriminating official, the entire complaint file--with names and identifying information deleted where appropriate as in paragraph F.5.b(1)(c)--**must** be made available for his or her review.

(c) If the agency takes or proposes an adverse or other disciplinary action against the ADO based on evidence developed in connection with the processing of the complaint, the entire complaint file--without deletions--**must** be made available for his or her review. For this purpose, "disciplinary action" includes any action (e.g., a requirement that the official undergo equal employment opportunity training) which would constitute censure of the ADO's conduct or competence.

6. Avoidance of Delay. The complainant, the investigator, and management officials must proceed with processing the complaint so that it can be resolved within 180 calendar days after it was filed. If a

d. Hearings. If the complainant requests a hearing, the EEOC will notify the Director of EEO, who will request the Civil Service Commission to assign a complaints examiner who is not an employee of the Department of Defense. The complaints examiner will review the file and, if necessary, return it to the Director of EEO for further investigation.

(1) Conduct of Hearing. The complaints examiner shall conduct the hearing in accordance with Civil Service Regulations to bring out pertinent facts. Rules of evidence will not be applied strictly, but the complaints examiner will exclude irrelevant or unduly repetitious evidence. Principals at the hearing shall be given the opportunity to cross-examine witnesses who appear and testify. Testimony will be given under oath or affirmation.

(2) Notification and Rights of the ADO

(a) The ADO would normally be expected to have personal knowledge of facts bearing on the complaint, and his or her testimony at a hearing would ordinarily be considered necessary by the parties to the complaint. However, if the ADO is not called to testify by either the complainant or the agency, the complaints examiner assigned to conduct the hearing in the case must assure that the ADO is informed of the hearing and given an opportunity to testify if he or she wishes to do so. The examiner must make sure that the ADO has an opportunity to comment for the record regarding any new allegations of wrongdoing on the ADO's part which are brought by other witnesses during the course of the hearing.

(b) The ADO has a right to have a representative present to provide advice at any time the ADO is asked for testimony during the complaint process, including the investigative and hearing stages. However, the representative's role at a hearing is limited to advising the ADO how to respond to questions. The presence of the ADO and his or her representative at a hearing will be limited to the time the ADO appears as a witness. The representative does not have the right to examine and cross-examine witnesses. Only the complaints examiner and the representatives of the complainant and the agency may examine and cross-examine witnesses.

(3) Powers of Complaints Examiner. In addition to the other powers vested in the complaints examiner under the provisions of this Instruction, the complaints examiner is authorized to:

(a) Administer oaths or affirmations;

(b) Regulate the course of the hearing;

(c) Rule on the admissibility of the hearing;

(d) Limit the number of witnesses whose testimony would be unduly repetitious;

(e) Exclude **any** person from the hearing for **contumacious** conduct or misbehavior that obstructs the hearing.

(4) Witnesses at Hearing

(a) The complaints examiner will request the EEO to make available as a witness an employee requested by- the complainant when the examiner determines that the testimony of the employee is necessary. The **examiner** may also **request** the-appearance of an employee of any Federal agency whose testimony is determined necessary to the complaint. If the complaints examiner denies a request by the complainant for the appearance of employees as witnesses, the examiner will insert into the record the reasons for denial of the request.

(b) Employees will be made available as witnesses at a hearing when requested to do so by the complaints examiner, if it is not administratively impracticable. If it is not practicable, the EEO will provide an explanation to the complaints examiner. If the complaints examiner finds the explanation inadequate, **the** EEO will be advised, and the employee will be required to be present as a witness at the hearing. If the **EEO's** explanation is considered adequate, the complaints examiner will insert it in the record of the hearing, provide a copy to the complainant, and make arrangements to **secure** testimony from the employee through a written interrogatory.

e. Record of Hearing. The hearing will be recorded and transcribed verbatim. All documents submitted to, and accepted by, the complaints examiner at the hearing, will be made part of the record.

f. Findings, Analysis and Recommendations. The complaints examiner shall send the complaint file (including the record of the hearing, findings, analysis on the matter which gave rise to the complaint, and a general impression of the environment from which the complaint arose) to the Director of EEO with a recommended decision on the merits of the complaint. The complaints examiner shall notify the complainant of the date on which this was done.

g. Final Decision Letter.

(1) A finding of discrimination by the complaints examiner becomes the final decision, if the Director of EEO has not issued a final decision adopting, rejecting, or modifying the recommended decision by the later of two dates:

(a) Within 30 calendar days after the EEO received the recommended decision, or

final decision has not been issued, and the Civil Service Commission has not been requested to supply a complaints examiner within 75 calendar days from the date the complaint was filed, the Civil Service Commission may require the agency to take special measures to ensure prompt processing of the complaint on a reimbursable basis.

7. Appeal to the Civil Service Commission

a. Entitlement. A complainant may not appeal to the Civil Service Commission under this regulation if the issue of discrimination giving rise to the complaint is being or has been considered in connection with another appeal to the commission by the complainant. A complainant may appeal the decision of the Director of EEO to reject or cancel the complaint. The complainant may also appeal on the merits of the complaint when the Director of EEO's final decision (under subparagraph F.5.c.(3)) **does** not resolve the **complaint** to his-or her satisfaction.

b. Information Provided to the ADO. If a complainant appeals the decision to the Civil Service Commission's Appeals Review Board, a copy of the Board's decision will be provided to the ADO. If the decision of the Board reverses or modifies the agency decision in such a manner as to affect the ADO, the Director of EEO will apply the procedures outlined in paragraph E.5.g (3).

c. Where To Appeal. Appeals must be written and mailed or personally delivered to the Appeals Review Board, U. S. Civil Service Commission, 1900 E Street, N.W., Washington, D.C. 20415.

d. Time Limit. The complainant may file an appeal any time after receiving written notice of the Director of EEO's decision but not later than 15 calendar days after receipt of the written notice. The Appeals Review Board may **extend** this **time** limit if the complainant was not otherwise aware of it or that circumstances beyond the complainant's control prevented filing a timely appeal.

G. EFFECTIVE DATE

This Instruction is effective immediately.



D. O. Cooke

Deputy Assistant Secretary of Defense

Enclosure - 1

1. References

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REFERENCES

- (d) DoD Directive 1100.15, "The Department of Defense Equal Opportunity Program," June 3, 1976
- (e) Administrative Instruction No. 31, "Equal Employment Opportunity," September 26, 1978
- (f) Administrative Instruction No. 21, "Processing Class Complaints of Discrimination,"
- (g) Administrative Instruction No. 70, "Appeals from Adverse Action," September 14, 1974